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No. 95-116

In The

Supreme Court of the United States

October Term, 1995

DONNA WINTERS, an individual person,

Petitioner,

v.

COSTCO WHOLESALE GROUP BENEFITS PROGRAM AND CONCEPT ADMINISTRATORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* and BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

MOTION

The National Association of Insurance Commissioners moves for leave to file a Brief *Amicus Curiae* in support of Petitioner, Donna Winters. The Brief *Amicus Curiae* is printed with this motion in accordance with Rule 37 of the *Rules of the Supreme Court*.

ISSUE OF CONSENT

Ms. Yana Koubourlis has consented, on behalf of Petitioner Donna Winters, to our filing a Brief *Amicus*

Curiae. The original form indicating Ms. Winters' consent was submitted to the Clerk of this Court with the filing of this motion and the Brief *Amicus Curiae*. Mr. Hall, on behalf of Costco Wholesale Group Benefits, refused to consent to our filing a Brief *Amicus Curiae*. His refusal was given to NAIC counsel on August 1, 1995 in a telephone conversation.

INTEREST OF MOVANT

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose members consist of the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC seeks permission to file the attached Brief *Amicus Curiae* in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

Issues of federal preemption of state health insurance rules have clogged the courts in recent years. Insureds, regulators, and insurers need the guidance of the Court to resolve preemption issues, to reduce the continuing flow of litigation and to require just application of law. If this Court agrees with the reasoning set forth in the NAIC brief, the Court will grant the Petition for a Writ of Certiorari so that this case may be argued on the merits.

FOCUS OF BRIEFS

The Petition For Writ of Certiorari, submitted on behalf of Donna Winters, details the disagreement among the U.S. Circuit Courts as to whether or not a certain type of insurance policy should be construed in favor of the insured.

Although the Respondent's brief has not yet been filed, it will likely focus on supporting the *Winters* decision rendered by the U.S. Court of Appeals for the Ninth Circuit. The *Winters* Court held that federal law requires denial of the health insurance benefits sought by Donna Winters. *Winters v. Costco Wholesale Group Benefits*, 49 F.3d 550 (9th Cir. 1995).

Other *Amicus Curiae* briefs may focus on discrimination against women in determining health insurance benefits and improper denial of insurance coverage for experimental treatments.

The NAIC's brief focuses on important questions of law and public policy which have not been adequately presented to the Court by the parties to this case or by other friends of the Court.

The focus of the NAIC brief is that the Ninth Circuit *Winters* decision should be reversed because the Ninth Circuit failed to apply state common law. The state common law doctrine of *contra proferentem* should have been applied because it is a well-established doctrine which protects health insurance policyholders and because it is not preempted by federal law. Furthermore, failure to apply *contra proferentem* frustrates the purpose of the Employee Retirement Income Security Act (ERISA) which

is to protect policyholders. ERISA, 29 U.S.C.A. § 1001(b) (1985). The NAIC brief explains insurance regulators' concerns that without this Court's review of the *Winters* decision, policyholders with traditional state-regulated policies will receive the benefit of *contra proferentem* while ERISA policyholders will not. This inequity is contrary to public policy and could even motivate employers to convert to ERISA plans simply to avoid state insurance laws.

THEREFORE, the NAIC respectfully requests permission to file the attached Brief *Amicus Curiae* in support of Petitioner, Donna Winters.

Dated the 17th day of
August, 1995

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INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association of the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

Following a request from the Washington Insurance Commissioner, the Executive Committee of the NAIC, which consists of seventeen insurance commissioners from all regions of the country, recommended to the entire membership of the NAIC that the NAIC file a Brief *Amicus Curiae* in this case. Subsequently, the NAIC members adopted the recommendation and voted to file this Brief for several reasons that will be detailed herein.

The insurance commissioners have been charged by the McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011, 1012, and by their own state statutes, *see, e.g.*, WASH. REV. CODE §§ 48.02.060, 48.02.080 (NILS 1995), to regulate the business of insurance. The insurance commissioners regulate many types and aspects of the business of insurance, including health insurance contracts. *See, e.g.*, WASH. REV. CODE §§ 48.18.010-48.18.540 (NILS 1995).

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 1001-1461 (1985) is a federal law that governs employer-sponsored health care plans. The United States Court of Appeals for the Ninth Circuit

held that ERISA preempts application of a particular state common law doctrine to the health insurance contract of Donna Winters. *Winters v. Costco Wholesale Group Benefits*, 49 F.3d 550 (9th Cir. 1995). The decision results in the unfair, undesirable and inconsistent application of rules of insurance policy interpretation: policyholders of traditional state-regulated health plans have the advantage of the common law rule of *contra proferentem, see*, George J. Couch, *Couch Cyclopedia of Insurance Law* 334 (1984), while according to the *Winters* Court, ERISA policyholders do not. *Winters v. Costco Wholesale Group Benefits*, 49 F.3d 550 (9th Cir. 1995).

The state insurance commissioners urge this Court to grant the Petition For a Writ of Certiorari, so that the Court may ultimately consider this case on its merits and eliminate the inequitable treatment of policyholders. The commissioners are interested in seeing this Court resolve the inconsistent application of *contra proferentem* so that all health care insurance consumers may enjoy the benefit of *contra proferentem*. Additionally, the insurance commissioners seek guidance from the Court regarding the scope of ERISA preemption of state common laws.

SUMMARY OF THE ARGUMENT

The *Winters* Court held that the state common law doctrine of *contra proferentem* should not be applied to the health insurance policy of Ms. Winters, the Petitioner. *Winters*, 49 F.3d 550. The result is that Ms. Winters' policy was construed against her and the coverage she sought was denied.

The NAIC argues that this Court should grant Ms. Winters' Petition for a Writ of Certiorari because the *Winters* decision should be reversed. *Contra proferentem* should be applied here because it is good law, well-established in every state to protect policyholders. ERISA does not specifically exempt state rules of statutory construction, and, in the absence of specific ERISA rules of construction, state rules should apply. In fact, *contra proferentem* is consistent with the purpose of ERISA, which is to protect policyholders.

If this Court grants the Petition for a Writ of Certiorari and ultimately renders a decision on the merits, insurance regulators, policyholders, and insurers will know what to expect from ERISA health plans. Failure to grant the Petition would mean regulators, policyholders, and insurers would remain uncertain as to whether or not *contra proferentem* applies to ERISA plans.

The NAIC argues that the Court should grant the Petition and ultimately render a decision on the merits so that policyholders of traditional state-regulated health plans and policyholders of ERISA plans all receive the benefit of *contra proferentem*. Finally, the NAIC urges the Court to grant the Petition and ultimately rule on the merits so that employers cannot take advantage of ERISA merely to avoid the state doctrine of *contra proferentem*.

ARGUMENT

I. This Court Should Grant the Petition for a Writ of Certiorari Because the *Winters* Decision Should Be Reversed.

The Ninth Circuit *Winters* Decision should be reversed because the court failed to apply the state common law rule of *contra proferentem*.

A. *CONTRA PROFERENTEM* SHOULD BE APPLIED BECAUSE IT IS WELL-ESTABLISHED COMMON LAW

Contra proferentem is the common law doctrine requiring that insurance contracts be construed against the insurer. George J. Couch, *Couch Cyclopedia of Insurance Law* 334 (1984). This doctrine is well-established in state common law. In fact, courts have almost unanimously held that "insurance contracts must be liberally construed in favor of a policyholder or beneficiary thereof, whenever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance." John and Jean Appleman, *Insurance Law and Practice* 197 (1976).

Contra proferentem has been specifically applied to ERISA plans. *See, e.g., Kunin v. Benefit Trust Life Insurance Company*, 910 F.2d 534 (9th Cir. 1990), which has been followed by eleven courts, according to Shepard's citations. In *Kunin*, the Ninth Circuit Court of Appeals specified that unclear or ambiguous policy terms should be construed in favor of the insured. *Kunin* at 535. The *Kunin*

health plan was an employee welfare benefit plan governed by ERISA, but the *Kunin* Court emphasized that federal programs governed by federal law "do not inevitably require resort to uniform federal rules." *Kunin* at 539, *citing U.S. v. Kimbell Foods*, 440 U.S. 715, 727-28 (1979). Relying on *Kimbell*, the *Kunin* Court held that state law can control federally governed controversies "either because Congress intends courts to look to state law, or because the incorporation of state law into the federal common law is appropriate. . . . " *Kunin* at 539.

In the *Winters* case, application of state common law is clearly appropriate because insurance has been historically regulated by the states, resulting in a well-established body of state case law that uniformly applies *contra proferentem* to policy interpretation. *See, e.g.*, Couch at 334-357. In 1945, Congress enacted the McCarran-Ferguson Act which dictates that the business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C.A. § 1012. As a result, every state has developed comprehensive insurance laws that are enforced by state departments of insurance and interpreted by state courts. Therefore, we argue that application of the state doctrine of *contra proferentem* is appropriate within the meaning of *Kunin* and *Kimbell* because state courts have established a uniform body of law supporting such application while federal law is silent on the issue.

In fact, the *Kunin* court wrote that "it would take a certain degree of arrogance to controvert an opinion held with such unanimity in the various states and to adopt a contrary view as the federal rule." *Kunin* at 540.

Furthermore, the rationale for *contra proferentem* is relevant to traditional health insurance policies as well as ERISA policies. More specifically, *contra proferentem* was developed because an insurer drafts the insurance policies and should not, therefore be "allowed to take advantage of the very ambiguities that it could have prevented with greater diligence" and that once a policy has been drafted, the insured does not have an opportunity to amend it. *Kunin* at 540. ERISA policies, like traditional health insurance policies, leave the insured with less bargaining power than the policy drafter. Therefore, the ERISA policyholder deserves the protection that *contra proferentem* provides.

B. ERISA DOES NOT PREEMPT APPLICATION OF *CONTRA PROFERENTEM*

ERISA generally subjects persons to state insurance, banking and securities laws. ERISA, 29 U.S.C.A. § 1144(b)(2)(A) (1985). However, employee benefit plans such as Costco's self-funded health insurance plan, shall not be deemed to be "engaged in the business of insurance or banking for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." ERISA, 29 U.S.C.A. § 1144(b)(2)(B) (1985).

Despite the broad exemption language of the section quoted above, application of *contra proferentem* remains appropriate in this case because it is a common law doctrine which is not specifically exempted by ERISA. Additionally, ERISA fails to provide any guidance for interpretation of ambiguous health policy terms. In the

absence of specific provisions governing ERISA contract interpretation, the well-established body of state common law should apply, thereby implementing the doctrine of *contra proferentem*.

C. FAILURE TO APPLY *CONTRA PROFERENTEM* FRUSTRATES THE PURPOSE OF ERISA

ERISA begins with a section titled: "Congressional findings and declaration of policy." The first and third paragraphs of this section indicate Congressional interest in protecting interstate commerce and the Federal taxing power. The second paragraph illustrates Congressional interest in protecting policyholders:

> It is hereby declared to be the policy of . . . [ERISA] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA, 29 U.S.C.A. § 1001(b) (1985).

Congress was obviously concerned with the welfare of participants in employee benefit plans. The ERISA declaration of policy cites protection of participants' interests as the motivating factor for enacting ERISA. The doctrine of *contra proferentem* is consistent with this goal. Application of *contra proferentem* in this case would

require that any ambiguous policy terms be construed in favor of Ms. Winters, the plan participant. Failure to apply *contra proferentem* would frustrate the intent of Congress and would be contrary to public policy. Therefore, it is important for this Court to grant the Petition for Writ of Certiorari so that the *Winters* decision can be reversed.

II. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO RESOLVE THE DISPUTE AMONG THE CIRCUITS

Rule 10 of the *Rules of the Supreme Court* specifies that this Court will grant a petition for a writ of certiorari "when there are special and important reasons therefore." The Rule then indicates that a split among United States courts of appeals is a factor the Court will consider when determining whether a petition sets forth adequate special and important reasons.

The Winters Petition for a Writ of Certiorari details the conflicting holdings of all the U.S. circuit courts. The Seventh and D.C. Circuits consistently apply *Contra proferentem* to ERISA insurance policies. Winters Petition for a Writ of Certiorari, pp. 12-19, *citing, e.g., McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199 (7th Cir. 1993) and *Germany v. Operating Engineers Trust Fund of Washington, D.C.*, 789 F. Supp. 1165 (D.C. 1992).

The Fourth and Eleventh Circuits apply *Contra proferentem* under *de novo* review and under discretionary review if the plan administrator is subject to a conflict of interest. Winters Petition for a Writ of Certiorari, pp. 20-30, *citing, e.g., Glocker v. W.R. Grace & Co.*, 974 F.2d 540

(4th Cir. 1992) and *Florence Nightingale Nursing Service v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476 (11th Cir. 1995).

The Second and Sixth Circuits apply *contra proferentem* under *de novo* review only. Winters Petition for a Writ of certiorari, pp. 30-38, *citing, e.g., Masella v. Blue Cross & Blue Shield of Connecticut*, 936 F.2d 98 (2d Cir. 1991) and *Tolley v. Commercial Life Ins. Co.*, Nos. 92-6490, 92-6514, 1993 U.S. App. LEXIS 33508 (6th Cir. 1993).

The Eighth Circuit has held that ERISA preempts application of *contra proferentem* but has applied it when other tools of contract interpretation are not sufficiently helpful. Winters Petition for a Writ of Certiorari, pp. 39-40, *citing, e.g., Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980 (8th Cir. 1992) and *Delk v. Durham Life Ins. Co.*, 959 F.2d 104 (8th Cir. 1992).

The Ninth Circuit applies *contra proferentem* unless the plan is self-funded and the administrator has discretion to interpret contract ambiguities. Winters Petition for a Writ of Certiorari, pp. 40-55, *citing, e.g., Kunin*, 910 F.2d 534 and *Winters*, 49 F.3d 550.

Finally, the four remaining circuits apply *contra proferentem* when review is *de novo* but they have not considered whether to apply it when reviewing a claim for abuse of discretion or when a plan is self-funded. Winters Petition for a Writ of Certiorari, pp. 55-58 (citations omitted).

The obviously inconsistent application of *contra proferentem* to ERISA insurance policies is worthy of this Court's review. Insurance regulators in the various states

are anxious to see *contra proferentem* applied consistently to ERISA policies. Furthermore, ERISA participants deserve the protections *contra proferentem* provides. In the absence of this Court's guidance, similar litigation will continue to clog the lower courts, leaving ERISA plan participants uncertain of their rights and remedies unless their cases are individually litigated.

III. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO PREVENT THE UNFAIR RESULT THAT SOME POLICYHOLDERS RECEIVE THE BENEFIT OF STATE RULES OF POLICY CONSTRUCTION WHILE OTHER POLICYHOLDERS DO NOT

When the NAIC members, the insurance commissioners from the various states, discussed the need to file a Brief *Amicus Curiae* in this case, one of their primary concerns was the existing potential for inequitable treatment of policyholders. *See*, NAIC Executive Committee minutes, June 4, 1995, reprinted in pertinent part in the Appendix to this Brief. The commissioners were concerned that some policyholders would receive the benefit of state rules for contract interpretation while other policyholders would not. *See*, NAIC Executive Committee Minutes, reprinted in pertinent part in the Appendix to this Brief. This inequitable treatment of policyholders could be eliminated if the Court granted the Petition and ultimately found that *contra proferentem* was applicable to ERISA plans.

IV. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO ULTIMATELY DISCOURAGE EMPLOYERS FROM PURSUING ERISA PLANS SIMPLY TO AVOID STATE RULES OF POLICY CONSTRUCTION

Another issue discussed by the insurance commissioners was concern that "many employers would abandon traditional insurers and utilize self-funded ERISA plans for health coverage because of the favorable application of federal law for the plans against the beneficiaries." *See*, NAIC Executive Committee Minutes, reprinted in pertinent part in the Appendix to this Brief.

In fact, one recent statistical analysis found that avoidance of state-mandated benefits and state premium taxes has previously been a motivating factor for employers to convert from traditional health plans to self-insured ERISA plans. Jensen, Cotter, Morrisey, *State Insurance Regulation and Employers' Decisions to Self-Insure*, in the *Journal of Risk and Insurance, Vol. 62*, 186, 185-213 (1995). It is certainly conceivable that a desire to avoid state common law rules, like *contra proferentem*, could similarly motivate employers to convert to ERISA plans. Such avoidance of state law is clearly contrary to public policy, contrary to the intent of ERISA, and potentially harmful to insurance policyholders.

CONCLUSION

Ms. Winters' Petition for a Writ of Certiorari should be granted so that the Court may ultimately consider this case on the merits. The decision on the merits would eliminate inconsistent application of *contra proferentem* to ERISA plans and ensure proper protection of all health insurance policyholders. For these and all other reasons detailed in this Brief, the National Association of Insurance Commissioners respectfully urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

NAIC Executive Committee
Minutes
June 4, 1995

. . . 13. Request for Brief of *Amicus Curiae* from Commissioner Deborah Senn (Wash.) in *Winters* v. *Costco*

John Woodall (Wash.) explained that the lawsuit for which the request for *amicus curiae* brief was being made was on appeal to the U.S. Supreme Court through a petition for *certiorari* filed on behalf of the plaintiff. He said that the opinion in the case, *Winters v. Costco*, provided an interpretation of the rule of *contra proferentem*, a principle of common law that provides that any ambiguity in an insurance contract is construed against the drafter of the contract – the insurer. The Ninth Circuit Court of Appeals found that this principle does not apply to certain self-funded Employee Retirement Income Security Act (ERISA) plans. He said that this finding places the Ninth Circuit in conflict with other circuit courts. He said that insurance regulators have an interest in resolution of this conflict because the decision created two tiers of contract interpretation for health coverages – one for consumers of traditional health insurers and one for consumers of self-funded ERISA plans. The inconsistency of these two standards would result in an inequitable treatment of consumers. Furthermore, he indicated that it would be possible that many employers would abandon traditional insurers and utilize self-funded ERISA plans for health coverage because of the favorable application of federal law for the plans against the beneficiaries.

Susan Martin (NAIC/SSO) indicated that the NAIC had previously taken positions supporting the primacy of

states in the regulation of insurance in several ERISA cases in which the NAIC had filed *amicus curiae* briefs in the last year. She noted that the filing of an *amicus curiae* brief in *Winters v. Costco* would be consistent with those previous positions. She noted that the deadline for filing the brief would be due in the U.S. Supreme Court on Aug. 11, 1995.

Upon motion duly made and seconded, the Executive (EX) Committee directed the NAIC legal staff to file an *amicus curiae* brief in the *Winters v. Costco* case.